

**FROM THE COMMITTEE ON
MODEL CIVIL JURY INSTRUCTIONS**

The Committee has adopted the following amended model civil jury instruction effective July 31, 2012.

ADOPTED

[AMENDED] M Civ JI 178.12

PRETERMITTED SPOUSE: WILL EXECUTED PRIOR TO MARRIAGE (EPIC)

The law provides that a surviving spouse who married [her husband / his wife] after the [husband / wife] executed [his / her] will is entitled to a certain share of the deceased [husband / wife]'s estate. However, the surviving spouse is not entitled to this share of decedent's estate if:

- *(a. the will was made in contemplation of the marriage, (or))
- *(b. the will expresses decedent's intention that it is to be effective despite a marriage after the will is made, (or))
- *(c. the decedent provided for [his wife / her husband] by transfer of property outside the will and intended the transfer to substitute for provision for [his wife / her husband] in [his / her] will.)

In this case, the share of [name of decedent]'s estate that [name of surviving spouse] would receive is the same share as [she / he] would have received if [her husband / his wife] died without a will ** (except that [she / he] may not receive any part of the estate held in trust for the benefit of, or set aside by or passing under the will to [name(s) of decedent's child / children born prior to the decedent's marriage to the surviving spouse but not the surviving spouse's child/children, or name(s) of descendant of decedent's child / children]).

The respondent has the burden of proving (any of) the following:

- *(a. the will was made in contemplation of the marriage, (or))
- *(b. the will expresses an intention of [name of decedent] that it is to be effective despite a marriage after the will is made, (or))
- *(c. [name of decedent] *** (provided for [name of surviving spouse] by transfer of property outside the will, and) intended that the transfer of property outside the will substitute for provision for [his wife / her husband] in [his / her] will.)

You must determine whether respondent has met [his / her] burden of proof.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

*The Court should delete any subsection that is not an issue in the case. Subsection b. should be deleted if the will is not ambiguous and there is no issue for the jury.

** This phrase should be read to the jury if there is part of the estate that the surviving spouse is not eligible to share. See MCL 700.2301(1)(a)–(c). The provision of EPIC that sets forth the share of the estate allotted to a pretermitted spouse is reproduced in the Introduction to this chapter.

***If the parties do not dispute the transfer or transfers of property outside the will, the Court should delete this first part of subsection c.

The will or other evidence may be used to show that the will was made in contemplation of the marriage; decedent's intent to substitute transfers outside the will may be shown by his or her statements or reasonably inferred from the amount of the transfer or other evidence. MCL 700.2301(2)(a), (c).

EPIC states one of the grounds for denying pretermitted spouse status as: "The will expresses the intention that it is to be effective notwithstanding a subsequent marriage." MCL 700.2301(2)(b). For cases construing a similar provision in prior law, see the comment to M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC).

The spouse claiming under MCL 700.2301 must show that he or she is the surviving spouse and that he or she married the testator after the will was executed. If either of these present issues of fact, this instruction must be modified.

MCL 700.2301 is taken almost verbatim from the 1990 version of the Uniform Probate Code (UPC) §2-301. The UPC comment explains that the moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3) (numbered (2) (a), (b), and (c) in the Michigan statute).

Comment

MCL 700.2301.

The pretermitted spouse section of EPIC departs substantially from prior law. First, EPIC discards the requirement that to claim pretermitted status, the surviving spouse needs to be omitted from the will altogether. Second, under EPIC, only a spouse who married the testator after the will was executed may claim as a pretermitted spouse. Prior law permitted any surviving spouse to make a claim if his or her omission from the

will was based on “oversight or mistake.” Third, EPIC eliminates “oversight or mistake” as specific grounds for a claim as a pretermitted spouse.

Under prior law, where decedent’s will made prior to marriage to the surviving spouse made a bequest to her as “a friend,” the spouse did not meet the statutory definition of an “omitted spouse” for whom the “testator fails to provide by will” even though decedent may not have contemplated the marriage when the will was made. *In re Estate of Herbach*, 230 Mich App 276, 284, 287; 583 NW2d 541 (1998). The EPIC revision changes this result. Under EPIC, a surviving spouse who married the testator after the will was executed may claim a share as a pretermitted spouse even if he or she receives some bequest in the will unless it appears from the will or other evidence that the will was made in contemplation of the marriage, or the will indicates it is to be effective despite a subsequent marriage, or transfers outside the will are intended to substitute for a testamentary provision.

Two pre-EPIC cases involved transfers outside the will to surviving spouses: *In re Cole Estate*, 120 Mich App 539; 328 NW2d 76 (1982), and *Noble v McNerney*, 165 Mich App 586; 419 NW2d 424 (1988). In both cases, the appellate court affirmed trial court findings that the decedent did not intend any of the transfers to substitute for a testamentary disposition for the spouse. The Michigan Court of Appeals also held in *Cole* that a widow’s right to elect a statutory share under MCL 700.282(1) (now MCL 700.2201) did not waive her right to claim a share of the estate as a pretermitted spouse.

History

M Civ JI 178.12 was added April 1, 2002.

Amended July 2012.

The Michigan Supreme Court has delegated to the Committee on Model Civil Jury Instructions the authority to propose and adopt Model Civil Jury Instructions. MCR 2.512(D). In drafting Model Civil Jury Instructions, it is not the committee’s function to create new law or anticipate rulings of the Michigan Supreme Court or Court of Appeals on substantive law. The committee’s responsibility is to produce instructions that are supported by existing law.

The members of the Committee on Model Civil Jury Instructions are:

Chair: Hon. Alfred M. Butzbaugh
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